

October 6, 2009

To The Members of the United States Senate:

The undersigned organizations oppose an amendment offered by Sen. Franken to the FY 2010 Department of Defense appropriations bill (H.R. 3326) that would, however well intentioned, set a dangerous precedent against dispute-related employment arbitration. This amendment not only impacts Defense Department contractors, but potentially any company that does business with a defense contractor so long as funds that can be traced to the FY 2010 DOD appropriations bill are involved.

At the outset, we want to acknowledge that the allegations in the Jamie Leigh Jones case, which are the catalyst for this amendment, are deplorable. However, the amendment is far more expansive in scope than needed to address the reprehensible treatment Ms. Jones described, and this matter is not indicative of the vast majority of employment-related arbitration claims in the defense industry or the business community as a whole. The 5th Circuit recently ruled that many of the most appalling claims in the Jones case did not have to be arbitrated and could be resolved in the courts – an outcome which demonstrates that legislation of this type is not needed.

Substantively, arbitration is more favorable to employees than litigation and individuals fare at least as well—if not better—in arbitration as they would have in court, while keeping down transaction costs. For example, the National Workrights Institute found in 2004 that employees were almost 20 percent more likely to win employment cases in arbitration than those litigated in court. Furthermore, employees frequently win their arbitration without needing to resort to having to hire an attorney and damage awards given to employees in arbitration are typically the same or even larger than court awards. For instance, in 2005, a mother-daughter broker team was awarded \$1.98 million in their sex discrimination arbitration against their former employer. Another employee received an award of over two million dollars—while representing himself in the arbitration.

In our view, eliminating arbitration will have serious negative implications for employees, because many cannot afford to bring their claims in court and therefore will abandon their claims altogether. In contrast to the skyrocketing costs of litigation, a large percentage of employees who bring claims in arbitration pay nothing to pursue their claims while others have only nominal fees. For example, the American Arbitration Association's (AAA) Employment Due Process Protocol and rules provide, for instance, that an employee cannot be required to pay more than \$150.00 to arbitrate a claim. Similarly, under JAMS' Minimum Standards of Procedural Fairness, an employee cannot be required to pay anything more than an initial filing fee; all other fees must be borne by the company.

Employees can arbitrate more quickly than they can litigate—and can get back to work faster. Furthermore, employees resolve their claims more quickly in arbitration—on average, 33 percent faster—than in federal court. In contrast, a civil case filed in federal district court faces a delay of nearly two years before reaching trial. Particularly when facing a difficult economy

with high unemployment, the value to an employee of swift redress and the possibility of reinstatement months or years earlier cannot be overstated.

Employees with modest claims are often effectively barred from obtaining relief in court—but can find justice in arbitration. As plaintiffs’ attorneys themselves admit, only about 5 percent of employees seeking help from the private plaintiffs’ bar are able to obtain counsel. In fact, a survey of plaintiffs’ lawyers demonstrated that an employee would need a claim of at least \$75,000 before an attorney would be willing to take the case, yet over half of the employment claims filed in the AAA in 2000 involved demands for less than \$75,000. When forced into the litigation system, many of these employees with more modest-sized claims will have no real option but to abandon their case.

Finally, it is important to note that courts already provide effective, case-by-case review of individual circumstances to ensure that the arbitration provisions are fair to employees. In fact, state and federal courts routinely exercise their existing authority under Section 2 of the Federal Arbitration Act to invalidate arbitration provisions deemed to be unfair to employees. The courts have stepped in aggressively to ensure that arbitration provisions do not impose high costs or burdensome travel, limit attorneys’ fees or other statutory remedies to which an individual is entitled, compel confidentiality, or create a biased process.

For these reasons, we oppose the Franken amendment. While we recognize the intention of Sen. Franken and the amendment’s cosponsors to contend with Ms. Jones very troubling allegations, an amendment with such broad policy implications should not be dealt with in the context of the overall appropriations process. Legislation of this type should be subject to hearings, committee action and regular order to assess all of its implications.

Sincerely,

American Bakers Association
American Financial Services Association
American Insurance Association
Associated Builders and Contractors
HR Policy Association
Independent Electrical Contractors, Inc.
International Franchise Association
IPOA, the Association of the Stability Operation Industry
National Association of Manufacturers
National Defense Industrial Association
National Retail Federation
Property Casualty Insurers Association of America
Society for Human Resource Management (SHRM)
TechAmerica
U.S. Chamber Institute for Legal Reform
U.S. Chamber of Commerce
Western Electrical Contractors Association (WECA-IEC)